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In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Appalachian Shale Products Co., 121 N.L.R.B. 1160 (1958) 12
Bickerstaff Clay Products Co. v. *NLRB*, 871 F.2d 980 (11th Cir. 1989), cert. denied, No. 89-144 (Oct. 16, 1989) 10
Brooks v. *NLRB*, 348 U.S. 96 (1954) 2
Celanese Corp. of America, 95 N.L.R.B. 664 (1951) 2
Cooperativa de Credito y Ahorro Vegabajena, 261 N.L.R.B. 1098 (1982) 6
Dold Foods, 289 N.L.R.B. No. 156 (July 28, 1988) 7
Drug Package Co., 228 N.L.R.B. 108 (1977), enforcement denied, 570 F.2d 1340 (8th Cir. 1978) 6
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987) 1, 2, 10, 11, 14
Hajoca Corp., 291 N.L.R.B. No. 16 (ALJ Sept. 30, 1988) 6
Hajoca Corp. v. *NLRB*, 872 F.2d 1169 (3d Cir. 1989) 6
IT Services, 263 N.L.R.B. 1183 (1982) 10
Johns-Manville Sales Corp., 289 N.L.R.B. No. 40 (June 27, 1988) 7, 10
Leveld Wholesale, Inc., 218 N.L.R.B. 1344 (1975) 6
Linden Lumber Div. v. *NLRB*, 419 U.S. 301 (1974) 10
Local 1545, United Bhd. of Carpenters v. *Vincent*, 286 F.2d 127 (2d Cir. 1960) 12
NLRB v. *Big Three Indus., Inc.*, 497 F.2d 43 (5th Cir. 1974) 13
NLRB v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972) 15
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 14
NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) 14

Cases—Continued: Page

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 13
NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) 13
NLRB v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) 5
NLRB v. *Koenig Iron Works, Inc.*, 681 F.2d 130 (2d Cir. 1982) 10
NLRB v. *Local 103, Ironworkers*, 434 U.S. 335 (1978) 5
NLRB v. *Pennco, Inc.*, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982) 5, 6
NLRB v. *Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979) ..9-10, 11
NLRB v. *Windham Community Memorial Hosp.*, 577 F.2d 805 (2d Cir. 1978) 5, 6
Osteopathic Hosp. Founders Ass'n v .*NLRB*, 618 F.2d 633 (10th Cir. 1980) 6
Pennex Aluminum Corp., 271 N.L.R.B. 1205 (1984) 12
Retired Persons Pharmacy v. *NLRB*, 519 F.2d 486 (2d Cir. 1975) 11
Salinas Valley Ford Sales, Inc., 279 N.L.R.B. 679 (1986) 12
Service Elec. Co., 281 N.L.R.B. 633 (1986) 6
Stormor, Inc., 268 N.L.R.B. 860 (1984) 10
Texas Petrochemicals Corp., 296 N.L.R.B. No. 136 (Sept. 29, 1989) 11
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 2
United States Gypsum Co., 157 N.L.R.B. 652 (1966) 9
Valley Doctors Hosp., 222 N.L.R.B. 907 (1976) 12
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 2

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(b) (3), 29 U.S.C. 158(b) (3) 13
§ 9(c) (3), 29 U.S.C. 159(c) (3) 7
29 C.F.R. 101.18(a) 9

Miscellaneous:

2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959) 7
52 NLRB Ann. Rep. (1989) 13
NLRB Casehandling Manual (Apr. 1984) 13

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INTRODUCTION

This case involves the validity of a Board rule governing the circumstances under which an employer may withdraw recognition from the duly certified bargaining-unit representative of its employees. The underlying principles are well-established and, for the most part, undisputed: "First, after a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification. * * * Second, after this period, the union is entitled to a rebuttable presumption of majority support." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987). To rebut

that presumption, an employer may show either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status. *Id.* at 41 n.8.[1]

The question in this case is whether an employer carries its burden to prove a reasonable doubt of the union's majority status by showing only that one-half or more of the bargaining unit consists of striker replacements who have crossed a picket line to get to work. The Board's "no-presumption" rule states that such proof is insufficient. Under the Board's rule, an employer must adduce additional evidence of the replacements' union sentiments in order to establish an objective basis for a good faith doubt of majority

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[1] Amicus curiae AFL-CIO (Br. 5-8, 13-25) contends that an employer should not be entitled to withdraw recognition on the basis of a good faith doubt. In its view, only a Board election that demonstrates an actual loss of majority status can justify withdrawal of recognition. But since none of the parties in this case challenged the appropriateness of a good faith doubt defense in the Board proceedings or in the court of appeals, and the issue was not raised as a question in the petition for certiorari, the question should not be considered. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); cf. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

In any event, amicus has offered no compelling reason for re-examining the propriety of the good faith doubt defense. An employer's good faith doubt of an incumbent union's majority status has been a lawful basis for withdrawing recognition since the Board first announced the rule in *Celanese Corp. of America*, 95 N.L.R.B. 664, 671-673 (1951). The principle has been unanimously endorsed by the courts of appeals, and this Court has cited it with approval. See *Fall River Dyeing*, 482 U.S. at 41 n.8; *Brooks* v. *NLRB*, 348 U.S. 96, 101 (1954); Resp. Br. 26 n.22 (citing cases).

support. For the reasons stated in our opening brief, the Board's rule is a rational construction of the National Labor Relations Act, grounded in a sensible empirical judgment as well as in important statutory policies.

The only issue before the Court is whether the Board's rule is a reasonable one—whether the Board has reasonably concluded that withdrawal of recognition must be based on more than the solitary fact that replacements equal or outnumber other employees in the bargaining unit, and that they have crossed a picket line to come to work. The decision of the court of appeals, reversing the Board, held that a finding of good faith doubt was *compelled* by such a showing. On that basis—and that basis alone—the court denied enforcement of the Board's order in this case.[2]

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[2] On the date recognition was withdrawn, there were 49 employees in the bargaining unit, 25 of whom were permanent replacements (see Pet. App. 3a). That the decision of the court of appeals rested on its rejection of the no-presumption rule with respect to those replacements is made clear in the majority opinion (*id.* at 10a):

> We hold that the Company was justified in doubting that the striker replacements supported the Union in this context. Over eighty percent of the bargaining unit work force * * * was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union.

As Judge Williams noted in dissent (*id.* at 12a): "The outcome of this case turns on the significance attached to the hiring of permanent replacements during an economic strike." Indeed, in earlier proceedings respondent's counsel likewise recognized that the lawfulness of the no-presumption rule

1. We restate these propositions to highlight how little of the question presented respondent and its amici have chosen to engage. Indeed, the opposing briefs in this case labor at length to establish points that are not even at issue.[3]

Respondent's principal submission (Br. 9-20) is that, as an empirical matter, replacements generally do not support the union. Respondent and the Chamber of Commerce attempt to establish that proposition by showing, *inter alia*, that unions usually seek the discharge of replacements in a strike settlement agreement; that unions have historically viewed replacements as "scabs"; and that at one time the Board had permitted employers to presume that replacements would not support the union (Br. 11-15; Chamber Br. 11-16).

It may well be that the Board could reasonably have adopted the rule urged by respondent and its amici—that replacements presumptively oppose the incumbent union. The question presented, however, is whether the Board's current approach—that the employer's burden is not satisfied simply by showing that 50% or more of its employees are replacements

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is the only relevant issue. Responding to an inquiry from a Board investigator, counsel explained: "Essential to the Company's refusal [to recognize and bargain with the Union] is the presumption that the replacements do not support the Union" (J.A. 131).

[3] For example, respondent contends (Br. 35-40) that, even without the benefit of the Gorman presumption, the evidence adduced below was sufficient to justify withdrawal of recognition. The court below did not, however, decide that question, and it is not presented here. Whether the evidence was sufficient, apart from the Gorman presumption, may be resolved by the court of appeals on remand from this Court.

who crossed a picket line—commands rational support. It plainly does.[4]

As we showed in our opening brief (Br. 16-19), the Board reached the reasonable empirical judgment that not all strikes are alike and that not all replacements are motivated by the same considerations. Some strikes are doubtless marred by acrimony and violence (see Resp. Br. 12-16; Chamber of Commerce Br. 11-16); others, notably including the strike in this case, are not.[5]

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[4] Deference is owed decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *Local 103, Ironworkers*, 434 U.S. 335, 351 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). But contrary to the assertion of respondent (Br. 16-20) and amicus Chamber of Commerce (Br. 7), the Board's current view, enunciated in *Station KKHI* (Pet. App. 58a-78a), does not represent a radical departure from prior Board law. As shown in our opening brief (at 4-5), the Board began in the mid-1970's to move away from its previous view that striker replacements undoubtedly oppose representation by the incumbent union. The Board's current position is based on its evolving understanding of industrial reality. It is also consistent with the decisions of two courts of appeals that criticized the Board's transitional view that striker replacements should be presumed to support the incumbent union in the same ratio as the original vote in the Board's representation election. See *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805 (2d Cir. 1978); *NLRB* v. *Pennco, Inc.* 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982).

[5] In its statement of facts, respondent (Br. 4) erroneously asserts that the "replacements had to cross a hostile picket line to report for work." Although respondent made such an assertion in support of its motion for summary judgment (J.A. 135), it offered no testimony on that point at the unfair labor practice hearing after summary judgment was denied. Indeed, the evidence adduced at trial indicates that the picket

Similarly, striker replacements may cross a picket line for any number of reasons; hostility to the incumbent union may not be among them. As the Board pointed out in *Station KKHI* (Pet. App. 75a), replacements may be motivated by economic pressures or opposition to a particular strike, but may still desire union representation.[6] Accord *Hajoca Corp.* v. *NLRB*, 872 F.2d 1169, 1172 (3d Cir. 1989); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805, 813 (2d Cir. 1978).[7]

Respondent (Br. 15 n.12) and the Chamber of Commerce contend (Br. 11-12 & n.17) that the no-presumption rule is inconsistent with the Board's decisions in *Service Elec. Co.*, 281 N.L.R.B. 633, 642 (1986), and *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350-1351 (1975). In those cases, the Board

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line was maintained in an uneventful manner; there is no indication that those who crossed it were subjected to any hostility (see Pet. App. 49a-50a).

[6] The present case illustrates the point. As Judge Williams noted in dissent (Pet. App. 23a-24a), in respondent's interviews with a majority of the replacements, only one comment indicated opposition to the Union. See Pet. Br. 19.

[7] See also *Cooperativa de Credito y Ahorro Vegabajena*, 261 N.L.R.B. 1098, 1099 n.7 (1982) (striker replacement joined strike three months after accepting employment); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (ALJ Sept. 30, 1988), slip op. 8, 12 (out of two replacements in drivers' unit, one was a "lifetime member" of the incumbent union and the other a member at previous job); *Osteopathic Hosp. Founders Ass'n* v. *NLRB*, 618 F.2d 633, 637-638 (10th Cir. 1980) (applicants for replacement positions were members of incumbent union); *Drug Package Co.*, 228 N.L.R.B. 108 (1977), enforcement denied on other grounds, 570 F.2d 1340 (8th Cir. 1978) (same).

held that a union's primary loyalty during a strike is to the strikers, and, accordingly, that an employer has no obligation to bargain with a striking union over the wages and working conditions of replacements. Those cases indeed recognize the possible tension between a striking union and replacements; but they do not require the Board to adopt a presumption that replacements oppose the incumbent union, for purposes of an employer's decision to withdraw recognition.[8]

Respondent's reliance (Br. 22-26) on the legislative history of Section 9(c)(3) of the Act, 29 U.S.C. 159(c)(3), is similarly unpersuasive. As explained in our opening brief (at 22-23 n.13), Congress amended Section 9(c)(3) in 1959 to permit unreinstated economic strikers, as well as replacements, to vote in an election conducted within twelve months after commencement of a strike. That amendment reflected Congress's desire to foster stability during the course of a strike.[9] The Board's no-presumption rule is entirely responsive to the same concern. To be sure, as respondent notes, there were several statements during the legislative process that replacements

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[8] In addition, once a strike is over and job rights are resolved, a union's initial stance toward the replacements may ameliorate. At that point, moreover, the union has an obligation to represent all unit employees fairly. See, *e.g.*, *Dold Foods*, 289 N.L.R.B. No. 156 (July 28, 1988). See also *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (June 27, 1988), slip op. 12 n.11.

[9] As Representative Griffin explained, the purpose of the amendment was to prevent the "unscrupulous employer" from "provok[ing] a strike, hir[ing] replacements and then hav[ing] a quickie election to oust the union." 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1522, 1534 (1959).

may be hostile to a striking union. Those remarks do not, however, foreclose the Board's conclusion that, as an empirical matter, such sentiments may not hold for all replacements in all circumstances, and that the replacements' views may in any event change at the end of a strike.

2. Although respondent and its amici contend, at length, for the empirical validity of the Gorman presumption, they ignore the policy considerations that played a significant part in persuading the Board to reject it.

a. The no-presumption rule promotes the stability of collective-bargaining relationships (see Pet. Br. 19-27). By requiring the employer to establish the replacements' views on a case-by-case basis, the no-presumption rule limits the employer's ability to oust the incumbent union simply by replacing a sufficient number of striking employees. By contrast, the presumption that striker replacements oppose the union creates incentives for employers to stonewall negotiations, hire unnecessary replacements, and withdraw recognition from the bargaining representative. The Gorman presumption would also tend to chill the exercise of the statutory right to strike by imposing the risk of loss of representation—in addition to the loss of a job—if the strike were unsuccessful.

b. Respondent does not contest those policy judgments. Together with the Chamber of Commerce (Br. 17-23, 26-29), however, respondent contends (Br. 41-45) that the Board's no-presumption rule disserves the policy of employee free choice in the selection or rejection of a bargaining representative. Respondent reasons that although the employer is free to marshal evidence concerning the replacements' sentiments and thereby to establish its good faith

doubt of the union's majority status, such evidence is difficult to obtain and an employer cannot petition for a decertification election without it.[10] Respondent also asserts that while the employees, including the striker replacements, may petition for a decertification election by showing that 30% of the employees support the petition,[11] the union can easily block that petition by accepting the employer's last offer, or by filing an unfair labor practice charge against the employer. In respondent's view, the statutory policy of employee free choice would be better effectuated by permitting the employer to withdraw recognition when, as here, it has hired replacements for a majority of the strikers; at that point, respondent asserts, the burden should shift to the union—which is in a better position to determine the sentiments of the replacements—to establish in a Board election that it still commands majority support.

Respondent's effort to impose this regime on the Board is flawed in three respects.

i. A rule compelling a finding of good faith doubt on a showing that one-half or more of the employees were permanent replacements would, as respondent suggests, substantially lighten the employer's burden.[12] But the Board's refusal to embrace such a rule

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[10] See *United States Gypsum Co.*, 157 N.L.R.B. 652, 655-656 (1966).

[11] See 29 C.F.R. 101.18(a).

[12] In the almost 40 years since the decision in *Celanese* (note 1, *supra*), numerous Board and lower court decisions have made clear that an employer cannot withdraw recognition without considerably more than a "subjective" doubt; rather, good faith doubt requires "empirical and objective" evidence sufficient to support a reasonable belief that the union has lost its majority support. *NLRB* v. *Tahoe Nugget, Inc.*, 584

is justified by the Act's "overriding policy" of " 'industrial peace' "—a policy that is promoted by "stability in collective bargaining relationships." *Fall River Dyeing*, 482 U.S. 38.[13] The more easily an em-

F.2d 293, 299, 301 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979). Accord *NLRB* v. *Koenig Iron Works, Inc.*, 681 F.2d 130, 137-144 (2d Cir. 1982). Nor is it surprising that the evidence must be so substantial. The inquiry, after all, is designed to determine not the employer's state of mind, but the state of employee support for a duly recognized bargaining representative.

But contrary to respondent's contention (Br. 28-35), the good faith doubt and minority-in-fact tests have not merged either in theory or in practice. The latter test requires a numerical showing; the former allows for circumstantial evidence. (For examples of cases in which the Board has relied on such evidence in upholding an employer's claim of good faith doubt, see *IT Services*, 263 N.L.R.B. 1183 (1982); *Stormor, Inc.*, 268 N.L.R.B. 860 (1984)). The type and quantum of evidence that would satisfy the good faith doubt test are determined by the Board on a case-by-case basis, subject to review by the courts of appeals. As the Board explained in *Station KKHI* (Pet. App. 76a) and in this case (*id.* at 33a), however, "events * * * common to the hiring of replacements," such as crossing a picket line or the union's failure to contact replacements during the strike, are not sufficient to support a good faith doubt. See also *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 at 12 (June 27, 1988). But cf. *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (11th Cir. 1989), cert. denied, No. 89-144 (Oct. 16, 1989). For purposes of this case, the Court need not determine the full range of evidence that would satisfy the good faith doubt test, but only whether the Board was reasonable in concluding that the test is not satisfied merely by showing that striker replacements comprise a majority of the unit of employees, and that they crossed a picket line to get to work.

[13] For that reason, the Chamber of Commerce's reliance (Br. 28), on *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301 (1974), is misplaced. *Linden* involved the initial recognition of a union. In that setting, unlike this one, the interest in

ployer may establish a basis for withdrawing recognition, the more stability is threatened; indeed, this Court has acknowledged the danger that "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union" would be "inimical" to industrial peace. 482 U.S. 50 n.16.[14] An employer who could withdraw recognition as soon as it hired enough replacements would be encouraged to stonewall negotiations until that point is reached, instead of bargaining with the union in an effort to reach a new agreement.

ii. As the Chamber of Commerce notes (Br. 17-18), an employer may not poll its employees concerning their union sympathies without having a good faith doubt of the union's majority status. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. No. 136 (Sept. 29, 1989). But an employer *is* entitled, as respondent did here (Pet. App. 23a-24a; J.A. 58-59, 98-100, 165-170), to make non-coercive inquiries as to the employees' concerns about the job. Moreover, contrary to respondent's assertion (Br. 43-44; see also Chamber of Commerce Br. 17-20), the union is not necessarily in a superior position to assess the likely desires of replacements concerning representation. The union does not know the replacements or have ready access to their names and addresses during the strike. Nor

determining representation in an election need not be weighed against a countervailing interest in stability.

[14] Accord *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 301 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979) (since the employer seeks unilaterally to alter the status quo, "the burden is fair," even assuming "the employer usually does have inferior access to the relevant information and may risk penalty in garnering additional data"); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489-491 (2d Cir. 1975).

would the replacements be likely to volunteer information to the union during the strike; to the contrary, they would be more likely to give such information to the employer.

iii. Finally, respondent (Br. 44-45) and the Chamber of Commerce (Br. 22) overstate the effect of the "contract bar rule" on the ability of striker replacements to challenge the incumbent union's majority status. Under that rule, representation petitions, including decertification petitions, will generally not be processed during the term of a collective-bargaining agreement. See, *e.g.*, *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F.2d 127, 130-131 (2d Cir. 1960). But only a written and signed agreement is valid for contract bar purposes. *Appalachian Shale Products Co.*, 121 N.L.R.B. 1160, 1161-1164 (1958). See also *Valley Doctors Hosp.*, 222 N.L.R.B. 907 (1976). In the present case, for example, the employees were free to file a decertification petition unless and until respondent signed a document signifying that an agreement had been reached. Moreover, subject to the requirement of good faith, an employer is free to modify or withdraw a bargaining proposal. See, *e.g.*, *Pennex Aluminum Corp.*, 271 N.L.R.B. 1205, 1205-1206 (1984); *Salinas Valley Ford Sales, Inc.*, 279 N.L.R.B. 679, 689-691 (1986). In short, once a prior contract is no longer a bar, employees (including replacements) may file a decertification petition at any time before a new agreement is reduced to writing and signed.[15]

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[15] As respondent (Br. 44) and the Chamber of Commerce (Br. 18 n.28) note, under the Board's "blocking charge" rule the filing of an unfair labor practice charge alleging an unlawful withdrawal of recognition will ordinarily halt the processing of an election petition, including a decertification petition. NLRB Casehandling Manual (Part Two) Sec. 11730.3 (Apr. 1984); *NLRB* v. *Big Three Indus., Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974). Contrary to the assertion of the Chamber of Commerce (Br. 18 n.28), however, it does not take "months or even years" for the General Counsel to determine whether a charge has merit; the median time currently is 46 days. 52 NLRB Ann. Rep. 250 (1989). Moreover, were the charge found to be meritorious and a complaint issued, it is consistent with the policies of the Act that no election be held until the employer's unfair labor practices are remedied. Cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

3. a. Quoting from *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960), the Chamber of Commerce contends (Br. 25) that in adopting the no-presumption rule, the Board improperly acted " 'as an arbiter of the sort of economic weapons the parties can use . . . .' " Amicus misreads the *Insurance Agents'* case. There, the Court concluded that a union had not breached its duty to bargain in good faith when it engaged in economic pressure during negotiations and without declaring a formal strike. In refusing to enforce a cease-and-desist order, the Court faulted the Board for attempting to impose "some standard of properly 'balanced' bargaining power * * *" (361 U.S. 497). The Court concluded that, to permit the Board to "sit in judgment upon every economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard" of Section 8(b)(3), 29 U.S.C. 158(b)(3), would amount to "the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced" (*id.* at 497-498).

In the present case, by contrast, the Board has not sought simply to strike a balance with respect to the

use of economic weapons.[16] It has, instead, determined the permissible grounds on which an employer may respond to protected activity (an economic strike) by withdrawing from the union a status conferred by the Act and regulated by the Board. In that setting, the Board's exercise of its expert judgment is entirely appropriate. See generally *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987).

b. Similarly misplaced is respondent's reliance (Br. 20-21) on *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The central issue in *Fansteel* was whether an employer could be required to reinstate unfair labor practice strikers who had been discharged for engaging in an unlawful sit-down strike. The Court held that reinstatement could not be required; it then summarily concluded that, with the discharged employees excluded from the bargaining unit, the union could no longer claim a right to recognition by virtue of its one-time apparent majority.

Fansteel differs from the present case in two principal respects. First, at the time *Fansteel* was decided, the Board had not yet developed its present-day rules governing the withdrawal of recognition—rules that are involved in this case. Second, although the union in *Fansteel* had at one time apparently enjoyed majority support, no certification or recognition had occurred; indeed, that was the cause of the sit-down strike. There was, accordingly, no stable, established

[16] Even in the area of such economic weapons, this Court has recognized the Board's authority to prohibit tactics that are inherently destructive of interests that the Act is designed to protect. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

bargaining relationship that called for the protection afforded by the rules at issue here.

c. Respondent likewise errs in relying (Br. 21-22) on *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). In *Burns*, the Court held that a "successor" employer is required to bargain with the union that represented its predecessor's employees. The Court noted, however, that the case "would be a wholly different [one]" if the successor "had not hired [a majority of] employees already represented by a union" (*id.* at 280). Relying on that qualification, respondent contends that where, as in the present case, the majority of a bargaining unit consists of striker replacements, an employer should be free to refuse to bargain with the union.

Burns does not support respondent's contention. In *Burns* and other successorship cases, the question is whether the successor employer's new workforce retains a sufficient relationship to the predecessor's workforce to justify requiring the successor to recognize and bargain with the union that represented the predecessor's employees. Where, for example, the successor, acting in good faith, hires a workforce that is substantially unrelated to the predecessor's workforce—and which has therefore had no prior relationship to the union that represented the predecessor's employees—there is no basis for requiring the successor to recognize and bargain with the union. Since the successor and the predecessor are different entities, and the workforce too is different, there is simply no bargaining relationship to protect. Where, on the other hand, an existing employer hires replacements for striking workers, there *is* an ongoing bargaining relationship—a relationship that the statute seeks to protect. The no-presumption rule ensures that the

employer cannot dissolve that ongoing relationship solely by replacing a sufficient number of the striking employees.

* * *

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1989

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